

Decision 05-09-030 September 22, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval to Permit Broadwing Communications Services, Inc., to Use Certain PG&E Transmission Facilities for Fiber Optic Communication Equipment. (U 39 E)

Application 00-03-043
(Filed March 20, 2000)

**OPINION GRANTING APPROVAL
OF AN IRREVOCABLE LEASE ALLOWING BROADWING
COMMUNICATIONS SERVICES, INC. TO USE PACIFIC GAS AND
ELECTRIC COMPANY'S TRANSMISSION FACILITIES**

I. Summary

This decision authorizes Pacific Gas and Electric Company (PG&E) under Pub. Util. Code § 851 to enter into an irrevocable lease, pursuant to the Optical Fiber Installation and IRU Agreement (Agreement), and the First Amendment to the Agreement (First Amendment) between PG&E and Broadwing Communications Services, Inc. (Broadwing), that permits the installation and use of fiber optic facilities on PG&E's electric transmission towers, substations, rights-of-way, and other facilities.¹ Our granting of this application does not expand the authority previously granted to Broadwing. Broadwing is

¹ IRU means indefeasible right to use. All statutory references are to the Public Utilities Code unless otherwise referenced. The Agreement was executed by Broadwing's predecessor, IXC Communications, Inc.

authorized to undertake only those activities on PG&E's property that are authorized by its certificate of public convenience and necessity (CPCN).

II. The Agreement and First Amendment

On May 6, 1999, PG&E and Broadwing entered into the Agreement that would (1) allow Broadwing to install underground and overhead fiber optic facilities on PG&E's electric transmission towers, substations, rights-of-way, and other facilities; (2) vest bare legal title in the fiber optic facilities in PG&E subject to Broadwing's right to use the optical fibers to service its customers; and (3) allow PG&E to use a portion of the fibers in connection with its needs. PG&E would maintain ownership of its facilities subject to Broadwing's right to use them. For purposes other than the bare legal title, Broadwing would be considered the owner of the fiber optic facilities installed pursuant to the Agreement, subject to PG&E's right to use them. PG&E maintains that the Agreement enables it and Broadwing to expand their fiber optic systems more efficiently than if each proceeded independently. PG&E contends that the Agreement will not impair its provision of service to the public. Until the Commission's approval is secured, PG&E states that it has given Broadwing a revocable license to enter its facilities to install fiber optic systems. The current revocable license will convert to an irrevocable lease, which contains the same terms, except as provided in the Agreement and First Amendment, upon our approval of this application.

Broadwing and PG&E executed the First Amendment on August 28, 2000 to allow Broadwing to construct a spur to Santa Clara extending from PG&E's Trimble Substation to First Street in Santa Clara. PG&E filed a

supplement to this application on August 29, 2003, submitting the First Amendment for Commission approval.² PG&E contends that benefits to PG&E and its ratepayers, Broadwing, and the public that originated under the Agreement are increased by the First Amendment.

III. The Project

According to PG&E, Broadwing's California Fiber Optic Project (Project), that is the subject of the Agreement and the First Amendment, consists of approximately 98.3 miles of fiber optic cable, including 94.7 miles on PG&E property. The Project starts at Depot Road in Hayward and continues south approximately 39.3 miles to the Hicks Substation in San Jose, at which point it turns north and continues approximately 55.5 miles to the Martin Substation in San Francisco. The construction on PG&E's property includes approximately 2.3 miles of new underground conduit that was installed by trenching or directional boring.

PG&E states that the work under the Agreement and the First Amendment began on November 9, 1999, and that most of the work was completed prior to June 28, 2000, with the remainder being completed by March 3, 2001. PG&E represents that the facilities that are the subject of this application, including the spur to Santa Clara, were reviewed as part of Decision (D.) 02-02-023.

IV. D.02-02-023

On November 13, 2000, Broadwing filed Application (A.) 00-11-026 seeking to confirm its existing authority, and obtain approval of its existing

² PG&E represents that it did not file the First Amendment until three years after its execution due to an inadvertent oversight.

facilities, as well as new facilities described in its application. By D.02-02-023, the Commission granted an expanded CPCN that covered Broadwing's existing facilities, as well as additional facilities reviewed by the Mitigated Negative Declaration (MND) adopted in the decision. The facilities that are the subject of this application were included therein. Therefore, the facilities that are the subject of this application were approved by D.02-02-023.

V. Pub. Util. Code § 851

The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest may require. In this case, PG&E granted Broadwing a revocable license to use its property and install facilities prior to seeking authority to convert the revocable license into an irrevocable lease. PG&E claims it relied on Commission General Order (GO) 69-C to grant a revocable license to Broadwing, and allow construction on its property in anticipation of this application.

This case poses an issue as to whether the Project was appropriately undertaken under a revocable license as opposed to requiring prior Commission approval under a lease. GO 69-C provides an exception to the § 851 requirement for prior approval of, among other things, licenses of utility property for limited uses. GO 69-C establishes three key criteria for the exception:

- (1) The interest granted must not interfere with the utility's operations, practices, and service to its customers;
- (2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumers; and
- (3) The interest granted must be for "limited" uses of utility property.

In D.00-12-006, the Commission determined that “GO 69-C’s provisions regarding ‘limited use’ of utility facilities do not extend to the use of facilities that are to be constructed without the benefit of CEQA review.”³ The Commission also stated that: “We do not believe that undertaking a commitment with long term implications is a ‘limited use’ that qualifies for GO 69-C treatment.”⁴ In addition, the Commission stated that it would “deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement.”⁵

The aerial installation involved in the Project may have been a limited use that is easily removed. However, the 2.3 miles of trenching and boring are significant and permanent structures, and not easily removed. Therefore, the revocable license is essentially irrevocable for practical purposes. As a result, the Project exceeded the scope of the limited uses permitted by GO 69-C, and PG&E violated § 851. However, D.00-12-006 was adopted after this application was filed and after most of the construction was completed. Under these circumstances, we find that it may not have been clear to PG&E that a § 851 application was needed. As a result, we will not impose a fine for violating § 851.⁶

³ D.00-12-006, p. 1. CEQA refers to the California Environmental Quality Act.

⁴ Ibid., p. 7.

⁵ Ibid.

⁶ This is consistent with the conclusion we reached in D.04-10-036 in A.00-03-032 that was filed on the same day as this application and addressed a similar agreement between PG&E and WilTel Communications, LLC.

VI. California Environmental Quality Act (CEQA) Analysis

CEQA applies to discretionary projects to be carried out or approved by public agencies. Because the Commission must act on an applicant's request for approval of its application under § 851, the Commission must act as either a lead or responsible agency under CEQA. The lead agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.⁷ The Commission, as the designated lead agency, must consider what review is necessary under CEQA. If appropriate, the Commission must investigate alternatives, require the avoidance of adverse impacts, and require restoration or enhancement of environmental quality to the fullest extent possible.

PG&E claims that the Project was exempt under CEQA Guidelines § 15301(b) and § 15061(b)(3), and Commission Rule 17.1(h)(1)(A)(2), which provide a CEQA exemption for "minor alterations of existing... facilities involving negligible or no expansion of use."⁸ In D.04-04-014, we considered the installation of fiber optic cable on existing electric utility structures, and held that the installation qualified as a "minor alteration of existing facilities" and was, therefore, exempt from further analysis under CEQA because none of the following exceptions to the exemption from CEQA applied:

- (1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern;

⁷ CEQA Guidelines § 15051(b)).

⁸ CEQA Guidelines § 15301.

- (2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; or
- (3) there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.⁹

The exemption granted in D.04-04-014 appeared to contemplate activities that would have no significant environmental impact, such as installing fiber optic cable on existing electric utility structures. Here, in addition to the installation of aerial facilities in electric utility structures, the Project includes 2.3 miles of trenching or boring. Therefore, the Project involved alterations of existing facilities that were not minor, and that involved physical expansion, beyond the previously existing facility use that was not negligible, and that could potentially cause environmental impacts. In addition, there is no evidence that the Project was reviewed by another agency or in another forum. Therefore, a CEQA review of the entire Project was required.¹⁰ Since the Project was partially completed before this application was filed, and no CEQA review was performed, PG&E failed to comply with CEQA.

CEQA reviews potential environmental impacts relative to a baseline established before a project is constructed in order to allow public input, and to mitigate any potentially significant environmental impacts.¹¹ In this instance,

⁹ D.04-04-014, p. 6, citing General Order 131-D and CEQA Guidelines § 15300.2.

¹⁰ Once a CEQA review is triggered, potential impacts of the entire Project must be evaluated, even if some of the construction activities may be exempt. See, e.g., CEQA Guidelines § 15378.

¹¹ *County of Amador v. El Dorado County Water Association*, (1999) 76 Cal. App; 4th 931, 944, 953.

construction was partially completed before the application was filed, and no baseline was established. Any environmental impacts due to construction have already occurred, and the opportunity for public comment at this point would be meaningless. Therefore, CEQA review at this time would serve no useful purpose.¹² One option at this point is to require removal of the installed facilities. However, that could also impact the environment. Therefore, we will not require removal of the facilities.

Normally, we would consider imposing a fine for failing to comply with CEQA.¹³ Because we find that it may not have been clear to PG&E at the time the Project began that a § 851 application was needed, and because the § 851 application is the trigger for Commission CEQA review, the failure here does not warrant a fine.¹⁴ However, we advise PG&E that future applications submitted for approval under § 851 that involve construction must include sufficient information, including a detailed project description, to allow the Commission to evaluate a claimed CEQA exemption before the facilities are constructed.

¹² See, e.g., D.04-07-021, pp. 11-12.

¹³ The fact that D.02-02-023 in A.00-11-026 approved the subject facilities as existing facilities is not relevant to the issue of whether PG&E failed to comply with CEQA because that application was filed after this application was filed, and after most of the facilities were constructed. In other words, the failure had already occurred when A.00-11-026 was filed.

¹⁴ This is consistent with the conclusion we reached in D.04-10-036 in A.00-03-032 that was filed on the same day as this application and addressed a similar agreement between PG&E and WilTel Communications, LLC.

VII. Public Interest

In past decisions, we have stated that we would not approve applications where it appears that the applicant structured the transaction to avoid advance approval requirements. Since the violations were inadvertent in this instance, denying this application and/or requiring removal of the installed facilities would not serve the public interest.

In D.00-07-010, the Commission stated that:

“It is sensible for California’s energy utilities, with their extensive easements, rights-of-way, and cable facilities, to cooperate in this manner with telecommunications utilities that are seeking to build an updated telecommunications network. Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.”¹⁵

The Project results in the joint use of PG&E’s facilities that will help facilitate Broadwing’s service to its customers, while avoiding installation of duplicative infrastructure, by making use of existing PG&E plant. In addition, the installed facilities form a part of Broadwing’s fiber optic network. Since Broadwing is a competitor in the telecommunications market, the facilities that are the subject of this application contribute to the development of competition.

PG&E represents that the annual fee it receives from Broadwing represents fair market value for use of its facilities. In addition, PG&E receives dark fiber for its use, and the fiber optic cable functions as static wire for much of the

¹⁵ D.00-07-010, *mimeo.* at 6, 2000 Cal. PUC LEXIS 576, at *9.

route.¹⁶ PG&E also states that the annual fee, and the costs avoided by PG&E to install static wire are comparable to prices negotiated between other providers of rights-of-way and telecommunications companies. We have no reason to disbelieve these representations, and will accept them.

For the above reasons, approval of this application serves the public interest. Thus, in the circumstances presented here, we will approve PG&E's application.

VIII. Ratemaking Treatment

In its application, PG&E states that jurisdiction for rates and services over its electric transmission system rests with the Federal Energy Regulatory Commission (FERC). Thus, revenues from a license or lease of FERC jurisdictional property are subject to FERC accounting and ratemaking rather than Commission authority. In this instance, PG&E represents that the leased electric facilities are transmission facilities subject to FERC jurisdiction. We agree that lease revenues related to PG&E's electric transmission system would be addressed by FERC.

IX. Stop Work Notice

After the execution of the Agreement but before the execution of the First Amendment, by letter dated June 28, 2000, the Commission staff issued a Stop Work Notice (Notice) that required Broadwing to cease further construction of the Project until it received a CPCN authorizing such construction. Broadwing continued construction in violation of the Notice, and completed construction by March 3, 2001.

¹⁶ Static wire provides protection to transmission lines from lightning.

PG&E states that it became aware of the Notice at about the same time Broadwing received it. PG&E further states that it did not believe the notice applied to work completed pursuant to the Agreement. PG&E represents that the facilities would be used to provide electric service, and result in improved internal communications and system reliability. Therefore, PG&E argues that the facilities are for a utility purpose relating to PG&E's existing facilities and their use to provide utility service and, therefore, not within the scope of the Notice.

PG&E is wrong. Broadwing's telecommunications facilities, regardless of their location on PG&E property, are part of Broadwing's Project, and will be used by Broadwing to provide telecommunications services. A portion of the facilities will be used by PG&E in connection with the provision of services to its customers. The Project is not physically separable into a portion belonging to PG&E and a portion belonging to Broadwing, and Broadwing's use of the facilities is not incidental to PG&E's use. Therefore, since the portion belonging to Broadwing is subject to the Notice, the whole Project is.

PG&E improperly allowed Broadwing to continue working on the Project after receipt of the Notice. The Commission did not fine Broadwing in D.02-02-023 for constructing facilities without a CPCN or for violating the Notice. Broadwing's error in violating the Notice was greater than PG&E's error in not stopping Broadwing from doing so. Since we did not fine Broadwing, it would be inequitable to fine PG&E, and we will not do so. However, we expect PG&E's full compliance with Notices. We also expect PG&E to ensure that other entities performing construction located on PG&E's facilities or property comply with such Notices.

X. Response of the Office of Ratepayer Advocates (ORA)

ORA did not file a protest to this application. However, it did file a response to the application in which it states that it does not oppose the application provided that the construction complied with the Overhead Line Safety Requirements in GO 95. ORA recommends that future § 851 applications include engineering studies demonstrating compliance with GO 95, and accepted engineering practices. It also recommends that such applications address the impact on PG&E's ability to expand its transmission capacity. In its reply to ORA's response, PG&E agrees to confirm, in future applications, that the safety and reliability of its system will not be adversely affected, and to address any impact on future expansion of transmission capacity. However, while PG&E agrees to make engineering studies available upon request, it objects to being required to submit them with the application because they are voluminous and contain sensitive information pertaining to facilities and telecommunications equipment agreements.

ORA's recommendations regarding future § 851 filings are more appropriately addressed on a generic basis. Therefore, we will not address them herein.

XI. Prospective Approval

The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest may require. In this instance, only prospective approval of the irrevocable lease is requested. However, as discussed previously, the facilities constructed pursuant to the revocable license did not qualify under GO 69-C. Therefore, while we approve this application prospectively, PG&E is at risk for any adverse consequences that may result from its misuse of GO 69-C, violation of § 851, and

failure to comply with CEQA. In addition, our approval of this application is limited to those previously completed facilities specifically identified in the application, and subsequent supplements filed in this proceeding.

The second paragraph of § 851 provides that “any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public as to any...lessee...dealing with such property in good faith for value...” The Commission has interpreted this provision as protecting innocent lessees from having their transactions invalidated solely because the utility leased the property without advance approval under § 851.¹⁷ However, this does not invalidate the primary requirement of § 851 for advance Commission approval.¹⁸

The revocable license PG&E granted to Broadwing is a form of lease. We assume that Broadwing dealt with PG&E in good faith, and intends to be bound by the license. Therefore, PG&E should be able to enforce its rights under the revocable license. It would be inconsistent with § 851, and poor public policy to relieve a licensee of its obligations under a license. To do so would prevent PG&E from using its rights and powers under the revocable license to stop a licensee from using PG&E’s property in a manner harmful to PG&E’s performance of its duties to the public. Therefore, even though we find that PG&E misused GO 69-C, violated § 851, and failed to comply with CEQA, we do not by this decision relieve Broadwing of its obligations under the revocable license.

¹⁷ D.92-07-007, 45 CPUC 2d 24, 30.

¹⁸ Ibid.

XII. Motion to File Under Seal

Concurrent with this application, PG&E filed a motion to keep the unredacted version of the Agreement under seal. On August 29, 2003, it filed a motion to keep the unredacted version of the First Amendment under seal. The unredacted versions of the Agreement and the First Amendment include information such as the number of optical fibers installed for PG&E and Broadwing's use, compensation arrangements, length of the agreement and renewal periods, and commercial value of the facilities. Even though this application is over five years old, PG&E states that public release of this information would place it and Broadwing at an unfair business disadvantage. We have granted such motions in the past, and will do so here for a period of two years.

XIII. Categorization and Need for Hearings

In Resolution ALJ 176-3036 dated April 6, 2000, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

XIV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

XV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Jeffrey P. O'Donnell is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On May 6, 1999, PG&E and Broadwing entered into the Agreement that would (1) allow Broadwing to install underground and overhead fiber optic facilities on PG&E's electric transmission towers, substations, rights-of-way, and other facilities; (2) vest bare legal title in the fiber optic facilities in PG&E subject to Broadwing's right to use the optical fibers to service its customers; and (3) allow PG&E to use a portion of the fibers in connection with its needs. PG&E would maintain ownership of its facilities subject to Broadwing's right to use them. For purposes other than the bare legal title, Broadwing would be considered the owner of the fiber optic facilities installed pursuant to the Agreement, subject to PG&E's right to use them.

2. Until the Commission's approval is secured, PG&E has given Broadwing a revocable license to enter its facilities to install fiber optic systems.

3. The current revocable license will convert to an irrevocable lease, which contains the same terms, except as provided in the Agreement and First Amendment, upon our approval of this application.

4. Broadwing and PG&E executed the First Amendment on August 28, 2000.

5. PG&E filed a supplement to this application on August 29, 2003, submitting the First Amendment for Commission approval.

6. Construction of the Project on PG&E's property includes approximately 2.3 miles of new underground conduit that was installed by trenching or directional boring.

7. The work under the Agreement began on November 9, 1999. Most of the work was completed prior to June 28, 2000, with the remainder being completed by March 3, 2001.

8. The facilities that are the subject of this application were approved by D.02-02-023.

9. GO 69-C provides an exception to the § 851 requirement for prior approval of, among other things, licenses of utility property for limited uses. GO 69-C establishes three key criteria for the exception:

- (1) The interest granted must not interfere with the utility's operations, practices, and service to its customers;
- (2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable or necessary to serve its patrons or consumers; and
- (3) The interest granted must be for "limited" uses of utility property.

10. In D.00-12-006, the Commission determined that "GO 69-C's provisions regarding 'limited use' of utility facilities do not extend to the use of facilities that are to be constructed without the benefit of CEQA review." The Commission also stated that: "We do not believe that undertaking a commitment with long term implications is a 'limited use' that qualifies for GO 69-C treatment." In addition, the Commission stated that it would "deny applications to convert GO 69-C agreements to lease agreements in the future, where the structure of those transactions was designed to circumvent the advance approval requirements of Section 851, and the associated CEQA review requirement."

11. Since D.00-12-006 was adopted after this application was filed and after most of the construction was completed, it may not have been clear to PG&E that a § 851 application was needed.

12. In D.04-04-014, the Commission considered the installation of fiber optic cable on existing electric utility structures, and held that the installation qualified as a "minor alteration of existing facilities" and was, therefore, exempt from

further analysis under CEQA because none of the following exceptions to the exemption from CEQA applied:

- (1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern;
- (2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; or
- (3) There is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

13. There is no evidence that the Project was reviewed by another agency or in another forum.

14. CEQA reviews potential environmental impacts relative to a baseline established before a project is constructed in order to allow public input, and to mitigate any potentially significant environmental impacts.

15. Since construction of the Project was partially completed before the application was filed, and no baseline was established, any environmental impacts due to construction have already occurred, and the opportunity for public comment at this point would be meaningless.

16. In this instance PG&E's violation of § 851 and failure to comply with CEQA were inadvertent.

17. In D.00-07-010, the Commission stated that:

“It is sensible for California’s energy utilities, with their extensive easements, rights-of-way, and cable facilities, to cooperate in this manner with telecommunications utilities that are seeking to build an updated telecommunications network. Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.”

18. The Project results in the joint use of PG&E's facilities that will help facilitate Broadwing's service to its customers, while avoiding installation of duplicative infrastructure, by making use of existing PG&E plant.

19. The installed facilities form a part of Broadwing's fiber optic network.

20. Since Broadwing is a competitor in the telecommunications market, the facilities that are the subject of this application contribute to the development of competition.

21. The annual fee PG&E receives from Broadwing represents fair market value for use of its facilities.

22. PG&E receives dark fiber for its use, and the fiber optic cable will function as static wire for much of the route.

23. The annual fee, and the costs avoided by PG&E to install static wire are comparable to prices negotiated between other providers of rights-of-way and telecommunications companies.

24. The lease revenues related to PG&E's electric transmission system would be addressed by FERC.

25. After the execution of the Agreement but before the execution of the First Amendment, the Commission staff issued a Notice that required Broadwing to cease further construction of the Project until it received a CPCN authorizing such construction.

26. Broadwing continued construction in violation of the Notice.

27. PG&E became aware of the Notice at about the same time Broadwing received it.

28. Broadwing's telecommunications facilities, regardless of their location on PG&E property, are part of Broadwing's Project, and will be used by Broadwing to provide telecommunications services. A portion of the facilities will be used

by PG&E in connection with its provision of services to its customers. The Project is not physically separable into a portion belonging to PG&E and a portion belonging to Broadwing, and Broadwing's use of the facilities is not incidental to PG&E's use.

29. The Commission did not fine Broadwing in D.02-02-023 for constructing facilities without a CPCN or for violating the Notice.

30. Broadwing's error in violating the Notice was greater than PG&E's error in not stopping Broadwing from doing so.

31. The second paragraph of § 851 provides that "any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public as to any...lessee...dealing with such property in good faith for value..." The Commission has interpreted this provision as protecting innocent lessees from having their transactions invalidated solely because the utility leased the property without advance approval under § 851. However, this does not invalidate the primary requirement of § 851 for advance Commission approval.

32. The revocable license PG&E granted to Broadwing is a form of lease.

33. PG&E should be able to enforce its rights under the revocable license.

34. It would be inconsistent with § 851, and poor public policy to relieve a licensee of its obligations under a license because to do so would prevent PG&E from using its rights and powers under the revocable license to stop a licensee from using PG&E's property in a manner harmful to PG&E's performance of its duties to the public.

35. Public disclosure of the documents filed under seal would place PG&E and Broadwing at an unfair business disadvantage.

36. No protests to this application have been received.

37. Hearings are not required.

Conclusions of Law

1. The purpose of § 851 is to enable the Commission to review a proposed transaction before it takes place in order to take such action as the public interest may require.

2. Since the 2.3 miles of trenching and boring are significant and permanent structures and not easily removed, the revocable license is essentially irrevocable for practical purposes.

3. The Project exceeded the scope of the limited uses permitted by GO 69-C, and PG&E has violated § 851.

4. PG&E should not be fined for violating § 851.

5. The exemption granted in D.04-04-014 appeared to contemplate activities that would have no significant environmental impact, such as installing fiber optic cable on existing electric utility structures.

6. Since the Project includes 2.3 miles of trenching or boring, it involved alterations of existing facilities that were not minor, and involved physical expansion beyond the previously existing facility use that was not negligible and that could potentially cause environmental impacts.

7. A CEQA review of the entire Project was required.

8. Since the Project was partially completed before this application was filed and without a CEQA review, PG&E failed to comply with CEQA.

9. A CEQA review at this time would serve no useful purpose.

10. Since removal of the installed facilities could impact the environment, the Commission should not require removal of the facilities.

11. Because it may not have been clear to PG&E at the time the Project began that a § 851 application was needed, and because the § 851 application is the

trigger for Commission CEQA review, PG&E's failure to comply with CEQA does not warrant a fine.

12. Denying this application and/or requiring removal of the installed facilities would not serve the public interest.

13. This application serves the public interest, and should be approved.

14. Since the portion of the Project belonging to Broadwing is subject to the Notice, the whole Project is.

15. PG&E improperly allowed Broadwing to continue construction of facilities after receipt of the Notice.

16. The Commission should not fine PG&E for allowing Broadwing to violate the Notice.

17. PG&E should be required to ensure compliance with Notices.

18. While we should approve this application prospectively, PG&E should be at risk for any adverse consequences that may result from its misuse of GO 69-C, violation of § 851, and failure to comply with CEQA.

19. Our approval of this application should be limited to those previously completed facilities specifically identified in the application, and subsequent supplements filed in this proceeding.

20. Even though we find that PG&E misused GO 69-C, violated § 851, and failed to comply with CEQA, the Commission should not by this decision relieve Broadwing of its obligations under the revocable license.

21. PG&E's motions to keep the unredacted versions of the Agreement and the First Amendment under seal should be granted for two years.

22. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized prospectively under Pub. Util. Code § 851 (§ 851) to enter into an irrevocable lease, pursuant to the Optical Fiber Installation and IRU Agreement (Agreement) and the First Amendment to the Agreement between PG&E and Broadwing Communications Services, LLC (Broadwing), that would permit the installation and use of fiber optic facilities on PG&E's electric transmission towers, substations, rights-of-way, and other facilities.
2. The authority granted herein is limited to those previously completed facilities specifically identified in this application, and subsequent supplements filed in this proceeding.
3. PG&E shall comply with Stop Work Notices issued by the Commission's staff, and shall ensure that other entities performing construction located on PG&E's facilities or property comply with such Stop Work Notices.
4. The prospective authorization granted herein does not relieve Broadwing of its responsibilities under its revocable license from PG&E.
5. PG&E's motions filed with the application, and on August 29, 2003, to have the unredacted versions of the Agreement and First Amendment kept under seal are granted for two years from the effective date of this decision. During that period, the materials kept under seal shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

6. If PG&E believes that further protection of the materials kept under seal is needed, it may file a motion stating the justification for further withholding of the materials from public inspection, or for such other relief as the Commission's rules may then provide. This motion shall be filed no later than 30 days before the expiration date.

7. Application 00-03-043 is closed.

This order is effective today.

Dated September 22, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners